No. 91-1671

In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM J. MERTENS, ET AL., PETITIONERS

v.

HEWITT ASSOCIATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a nonfiduciary who knowingly participates in a breach of a fiduciary duty imposed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, is liable for losses that an employee benefit plan sustains as a result of the breach.

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INTEREST OF THE UNITED STATES

This case presents the question whether courts may enforce the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, against a nonfiduciary who knowingly participates in a violation of ERISA's fiduciary duties. The Secretary of Labor has primary enforcement authority for the fiduciary provisions of Title I of ERISA and has filed numerous ERISA actions seeking to impose liability on nonfiduciaries for participation in breaches of fiduciary duties imposed by ERISA. See, *e.g.*, *Whitfield* v. *Lindemann*, 853 F.2d 1298 (5th Cir. 1988), cert. denied *sub nom. Klepak* v. *Dole*, 490 U.S. 1089 (1989). As we explained in our brief filed at the petition stage at the Court's

invitation, the court of appeals' ruling unduly restricts ERISA's enforcement provisions. Because the Court's disposition of the case is likely to have a significant effect on the enforcement of ERISA, the Secretary has a substantial interest in this case.

STATUTORY PROVISIONS INVOLVED

The pertinent provisons of ERISA are reproduced in the Appendix to this brief, *infra,* 1a-3a.

STATEMENT

1. Petitioners are former employees of the Kaiser Steel Corporation and participants in the Kaiser Steel Retirement Plan, a qualified pension plan under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*[1] In 1980, while respondent was serving as the plan's actuary, Kaiser began to phase out its steelmaking operations. That action resulted in the early retirement of a large number of employees. Respondent, however, continued to use actuarial assumptions that did not reflect the increased costs the early retirements would impose on the plan. As a result, Kaiser did not adequately fund the plan, and plan assets became insufficient to satisfy benefit obligations. By early 1987, the Pension Benefit Guaranty Corporation (PBGC) had determined that the plan was underfunded and incapable of paying its liabilities. The PBGC terminated the plan and began paying its participants substantially reduced benefits. J.A. 3-7; see Pet. App. A2-A3, A17-A18.

2. In December 1989, petitioners filed this action alleging that respondent had violated ERISA and state

[1] This case was decided on a motion to dismiss and therefore the allegations of petitioners' complaint are taken as true. See Pet. App. A2, A19.

malpractice law. Petitioners claimed that respondent had caused losses to the plan by allowing Kaiser to set actuarial assumptions, failing to disclose that it served as an actuary for both Kaiser and the plan, and failing to disclose the plan's funding inadequacies.[2] Petitioners argued that respondent violated ERISA by breaching respondent's professional duties to the plan[3] and by participating in an unlawful party-in-interest transaction.[4] When respondent moved to dismiss the complaint for failure to plead causes of action cognizable under ERISA, petitioners advanced several legal theories: (1) that respondent was an ERISA fiduciary that breached its fiduciary duties; and (2) that even if respondent was not a fiduciary, it was liable under

[2] Petitioners also filed suit against members of the Investment Committee of the Kaiser Steel Retirement Plan, alleging that they had violated their fiduciary duties. See *Mertens* v. *Black*, 948 F.2d 1105 (9th Cir. 1991) (upholding district court's refusal to dismiss petitioners' claims against investment committee members).

[3] ERISA imposes various requirements concerning actuarial services. See, *e.g.*, 29 U.S.C. 1023(d) (certain ERISA plan administrators must prepare annual reports including statements by enrolled actuaries) and 1082(c)(3)(B) (costs, liabilities, interest rates, and other factors are to be calculated on the basis of "reasonable" actuarial assumptions that offer the actuary's "best estimate of anticipated experience under the plan"). Petitioners alleged that respondent's actions in providing actuarial services did not comply with the obligations set forth in ERISA and implementing regulations. J.A. 9-13.

[4] ERISA forbids various transactions between a plan and a "party in interest," including the furnishing of services. 29 U.S.C. 1106(a)(1)(C). The statute defines the term "party in interest" to include a "person providing services to [the] plan," 29 U.S.C. 1002(14)(B), but exempts from the prohibitions of Section 1106 any service contract for which "no more than reasonable compensation is paid." 29 U.S.C. 1108(b)(2). Petitioners claimed that respondent's fees were not "reasonable" because respondent's conflict of interest prevented it from providing adequate services to the plan. J.A. 13-14.

ERISA (a) for breaching nonfiduciary duties imposed on an actuary by ERISA or (b) for knowing participation in a breach of duty by a fiduciary. J.A. 9-14; see Pet. App. A2-A4.

The district court dismissed all of petitioners' claims. Pet. App. A17-A30.[5] The court dismissed the claim that respondent itself was a fiduciary based on its conclusion that professional service providers such as actuaries, attorneys, and accountants do not act as fiduciaries when they perform their ordinary duties. *Id.* at A20-A22. The court also dismissed petitioners' claim for monetary relief based on respondent's alleged violation of its actuarial duties. In the court's view, Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3), would not allow that type of relief because petitioners had not alleged that respondent had profited from the alleged violation. Pet. App. A23-A25. The court also rejected petitioners' "prohibited transaction" claim, which it characterized as merely an effort to recast the claimed breach of professional duty as a prohibited transaction. *Id.* at A25-A26. Finally, the court dismissed petitioners' claim that ERISA created a right of recovery against respondent as a knowing participant in a fiduciary breach, based on the Ninth Circuit's decision in *Nieto* v. *Ecker*, 845 F.2d 868 (1988), which held that ERISA bars such an action.[6] Pet. App. A22.

[5] The Pension Benefit Guaranty Corporation (PBGC) was named as a defendant in its capacity as the plan's statutory trustee. It answered and filed a cross-claim asserting that any recovery by petitioners should be paid to it. When the district court dismissed the action, it also dismissed the PBGC's cross-claim. See Pet. ii.

[6] The district court also held that petitioners' pendent state-law claim for professional negligence was barred by the State's two-year statute of limitations. Pet. App. A26-A27.

3. The court of appeals affirmed with respect to the ERISA claims.[7] Pet. App. A1-A13. With respect to the claim now at issue, the court relied on its holding in *Nieto* that ERISA "limits its coverage to fiduciaries, and nothing in the statute provides any support for holding others liable." *Id.* at A7 (quoting *Nieto*, 845 F.2d at 871). The court also rejected (Pet. App. A8-A9) petitioners' argument that the Omnibus Budget Reconciliation Act of 1989 (OBRA), Pub. L. No. 101-239, § 2101(a), 103 Stat. 2123, demonstrates that Section 502(a) authorizes a remedy against nonfiduciaries for knowing participation in a breach of fiduciary duty. OBRA amended ERISA to add Section 502(*l*), 29 U.S.C. 1132(*l*) (Supp. II 1990) (App., *infra*, 2a-3a), which authorizes the Secretary of Labor to assess a civil penalty against fiduciaries and "other person[s]" for a breach of fiduciary duty under ERISA or for "knowing participation" in such a breach. The court noted that Section 1132(*l*) applies only to the Secretary, and noted that the Congress that passed OBRA considered, but did not adopt, an amendment that explicitly would have overturned the result in *Nieto*. Pet. App. A8-A9.[8]

SUMMARY OF ARGUMENT

1. Section 502(a)(3) of ERISA grants any beneficiary of a plan covered by ERISA the right to sue for any "equitable relief" that is "appropriate * * * to redress * * * vio-

[7] The court reversed the trial court's ruling that petitioners' state-law professional negligence claim was barred by the statute of limitations. Pet. App. A11-A13.

[8] Petitioners filed a petition for rehearing with a suggestion of rehearing en banc, supported by the Secretary of Labor as an amicus curiae, urging the Ninth Circuit to overrule *Nieto*. The court of appeals denied the petition and rejected the suggestion for rehearing en banc. Pet. App. A15-A16.

lations [of 29 U.S.C. 1001-1168 or the plan]." 29 U.S.C. 1132(a)(3). The sole issue in this case is whether the relief petitioners seek – to be made whole for losses they suffered because of a breach of fiduciary duty in which respondent is alleged to have knowingly participated – is "appropriate equitable relief" to "redress" that breach.

2. Principles of equity traditionally applicable to cases involving trusts support petitioners' claim. First, courts of equity regularly awarded make-whole monetary damages to beneficiaries to redress violations of a breach of trust. Although such damages resemble compensatory damages awarded in courts of law, the equitable status of trusts historically made courts of equity the only forum authorized to provide such redress. Second, courts of equity did not limit beneficiaries' remedies to those against the trust's fiduciary, but also ordered third parties who knowingly participated in the breach of fiduciary duty to compensate beneficiaries for resulting losses. Hence, the relief sought by petitioners would have been available as a matter of course in a case in equity arising before ERISA's enactment.

But the broad preemption provision set forth in Section 514(a) of ERISA preempts all state laws that "relate to" any covered plan. Because the scope of the fiduciary duties with respect to an ERISA plan is now exclusively a matter of federal law, the States are no longer able to afford relief for breaches of fiduciary duty that involve an ERISA plan. Unless the general provision of Section 502(a)(3) provides the relief formerly available in courts of equity, ERISA will have left beneficiaries in a worse position than they were prior to ERISA's enactment. In light of ERISA's open-ended authorization to award "equitable relief" in Section 502(a)(3), ERISA should not be construed to require such a result.

3. Section 502(*l*) of ERISA, 29 U.S.C. 1132(*l*) (Supp. II 1990), confirms that ERISA did not abolish the equitable liability of nonfiduciaries. That provision explicitly authorizes the Secretary to seek a civil penalty not only for breach of fiduciary duty by "a fiduciary," Section 502(*l*)(1)(A), but also for "knowing participation in such a breach * * * by any other person," Section 502(*l*)(1)(B). Moreover, Section 502(*l*)(2)(B) defines the civil penalty to be assessed by the Secretary in terms of the amounts obtained in suits brought by the Secretary against "other person[s]" under Section 502(a)(5) of ERISA. Section 502(*l*) thus is premised on the Secretary of Labor's ability to secure, as "other appropriate equitable relief * * * to redress such violation" under Section 502(a)(5), a make-whole monetary recovery against nonfiduciaries who knowingly participate in a breach of fiduciary duty. Because the right of action granted to the Secretary by Section 502(a)(5) is coextensive with the private right of action under Section 502(a)(3) at issue in this case, the reference in Section 502(*l*) to suits against "other person[s]" demonstrates that Section 502(a)(3) must permit such suits against persons other than a fiduciary.

4. Finally, the relief sought by petitioners is not inconsistent with this Court's decision in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985). The Court in *Russell* held that a participant could not receive damages under Section 502(a)(2) for bad-faith processing of her claim for benefits, in excess of the damages available to her under the express terms of Section 502(a)(1)(B). The plaintiff in that case relied expressly on Section 502(a)(2), and the Court explicitly declined to consider the availability of relief under any other provision of ERISA. 473 U.S. at 139 n.5.

Moreover, reading *Russell* to preclude courts from granting any remedies beyond the specific remedies defined in detail in Section 502(a) would nullify the general provisions for "appropriate equitable relief" set forth in

Sections 502(a)(3) and 502(a)(5). Section 502 establishes a comprehensive enforcement scheme, with several remedies outlined in detail and two general provisions directing courts to develop remedies in light of underlying equitable principles. A ruling that relief is invariably limited to the basic remedies would contravene the language and structure of the statute as a whole.

ARGUMENT

ERISA AUTHORIZES CLAIMS AGAINST NONFIDUCIARIES WHO KNOWINGLY PARTICIPATE IN FIDUCIARY BREACHES

A. *Section 502(a)(3) of ERISA Authorizes Federal Courts To Award "Appropriate Equitable Relief * * * To Redress * * * Violations" of ERISA*

Part 4 of Title I of ERISA, 29 U.S.C. 1101-1114, titled "Fiduciary Responsibility," imposes a series of duties on fiduciaries who administer employee benefit plans. For example, Section 404, 29 U.S.C. 1104, enumerates certain fiduciary duties; Section 406, 29 U.S.C. 1106, specifies certain prohibited transactions; and Section 412, 29 U.S.C. 1112, establishes bonding requirements for officials who handle plan assets. In turn, Section 409 of ERISA, 29 U.S.C. 1109, authorizes three specific remedies against fiduciaries who breach those duties. First, a fiduciary is "personally liable to make good to [the] plan any losses * * * resulting from each * * * breach" of fiduciary duty. 29 U.S.C. 1109(a). Second, a court may order a breaching fiduciary to "restore to [the] plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary." *Ibid.* Third, a fiduciary "shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." *Ibid.*

Part 5 of Title I of ERISA, 29 U.S.C. 1131-1145, titled "Administration and Enforcement," sets forth the general remedial framework for Title I of ERISA. Section 501, 29 U.S.C. 1131, establishes criminal penalties; Section 502, 29 U.S.C. 1132, authorizes six different civil actions, described in the six numbered paragraphs of subsection 502(a). This case involves the second and third of those six paragraphs. The second paragraph, 29 U.S.C. 1132(a)(2), authorizes an action "for appropriate relief under [Section 409]." The third paragraph, on which petitioners' action rests, permits an action "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan or (B) to obtain other appropriate equitable relief (i) to redress such violations." 29 U.S.C. 1132(a)(3).

By contrast to Sections 409 and 502(a)(2) – provisions limited by their terms to relief against "[a]ny person who is a fiduciary," 29 U.S.C. 1109(a) – nothing in Section 502(a)(3) limits the class of permissible defendants. Hence, the language of Section 502(a)(3) establishes a general cause of action, available to any "participant, beneficiary, or fiduciary," for any "equitable relief" that is "appropriate * * * to redress * * * violations [of subchapter I or the plan]." Because (i) it is undisputed that petitioners were "participants" in the plan and (ii) petitioners have alleged that the actions in which respondents participated violated a "provision of th[e] subchapter"[9] or the terms of the plan, the sole issue before the Court is whether "appropriate equitable relief" includes the relief sought by petitioners: recovery from a nonfiduciary of losses a plan suffers because of a fiduciary breach in which the nonfiduciary knowingly participated. For the reasons discussed be-

[9] Section 502 appears in Subchapter I of Chapter 18 of Title 29, which includes 29 U.S.C. 1001-1168.

low, we believe – as do the majority of the courts of appeals[10] – that it does.

B. *Appropriate Equitable Relief Includes a Monetary Judgment Requiring a Nonfiduciary Who Knowingly Participates in a Breach of Fiduciary Duty To Redress Losses Suffered by the Plan as a Result of the Breach*

Under traditional equitable principles, the relief sought by petitioners would have been available before ERISA. Because ERISA preempts the remedies traditionally available under state laws that relate to covered employee benefit plans – whether based on a statute or common law – a conclusion that Section 502(a)(3) does not provide the relief sought in this case would require the conclusion that Congress intended to curtail that traditional form of relief when it acted to protect employee benefit plans in passing ERISA. That conclusion is untenable.

1. *Traditional equitable principles provide make-whole relief to beneficiaries of a trust harmed by a nonfiduciary who participates in a breach of trust*

"ERISA abounds with the language and terminology of trust law"; as a result, courts are to consult "general principles of trust law" developed by courts of equity[11] to de-

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[10] See *Diduck* v. *Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 279-281 (2d Cir. 1992); *Whitfield* v. *Lindemann*, 853 F.2d 1298, 1303 (5th Cir. 1988), cert. denied *sub nom. Klepak* v. *Dole*, 490 U.S. 1089 (1989); *Brock* v. *Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988); *Thornton* v. *Evans*, 692 F.2d 1064, 1078 (7th Cir. 1982); see also *Fink* v. *National Savings & Trust Co.*, 772 F.2d 951, 958 (D.C. Cir. 1985) (dictum). But see *Nieto* v. *Ecker*, 845 F.2d 868, 870-873 (9th Cir. 1988); *Useden* v. *Acker*, 947 F.2d 1563, 1582 (11th Cir. 1991), petition for cert. pending, No. 91-1944 (filed June 1, 1992).

[11] It should be beyond dispute that the reference to "equitable relief" refers to relief available in courts of equity. See *Black's Law*

termine what types of "equitable relief" are "appropriate" to "redress" violations under Section 502(a)(3). *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110, 115 (1989); see *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 570 (1985) (courts should consider "the common law of trusts"). Two of those principles demonstrate that the relief sought by petitioners is "appropriate equitable relief": courts of equity awarded make-whole monetary relief to redress a breach of trust; and courts of equity awarded relief against a nonfiduciary who participated in a breach of trust by a fiduciary.[12]

Dictionary 539 (6th ed. 1990) (defining "equitable relief" as "[t]hat species of relief sought in a court with equity powers").

[12] The Eighth and Ninth Circuits have stated that the reference in Section 502(a)(3) to "other appropriate equitable relief" should be construed to include only three categories of relief: injunctions to prevent violations of fiduciary duty, imposition of a constructive trust on plan assets, and removal of trustees. See, *e.g.*, *Sokol* v. *Bernstein*, 803 F.2d 532, 538 (9th Cir. 1986); *Novak* v. *Andersen Corp.*, 962 F.2d 757, 760 (8th Cir. 1992), petition for cert. pending, No. 92-352 (filed Aug. 26, 1992). Those decisions rely to a significant degree on the fact that the Senate Report offers those three types of relief as examples of appropriate equitable relief. See S. Rep. No. 383, 93d Cong., 1st Sess. 105-106 (1973). There is no indication in the report, however, that the passage was intended as an exhaustive catalogue of the types of relief that would be available under Section 502(a)(3); indeed, the relevant passage begins with the phrase "[f]or example." *Id.* at 105. The best guide for determining what types of relief should be available is the statutory language – which refers generally to the readily comprehensible concept of "equitable relief" – not a list of examples offered in the legislative history. See *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U.S. 633, 649 (1990).

a. In the realm of trust law, make-whole monetary relief has long been a traditional equitable remedy. The Second Restatement of Trusts illustrates this conclusion. Section 199 sets forth the "equitable remedies" available to the beneficiary of a trust. The third of these, set forth in Section 199(c), allows the beneficiary "to compel the trustee to redress a breach of trust." 1 Restatement (Second) of Trusts 437 (1959). The comment to Section 199(c) explains that the suit to gain redress should be governed by Section 205 of the Restatement, see *id.* comment c, at 438, which permits an award of monetary relief by making the trustee liable for any "loss" to the trust caused by a breach of fiduciary duty.[13] Indeed, each of the ten illustrations in the comments to Section 205 involves a monetary award against the trustee. *Id.* comments c-h, at 459-462.[14]

Moreover, it is clear that the monetary relief available under Section 205 included a right to "make-whole" damages. Comment a explains that the beneficiary has a number of options, one of which is "the option * * * of pursuing a remedy which will put him in the position in which he would have been if the trustee had not committed the breach of trust." 1 Restatement (Second) of Trusts 458 (1959). Thus, "the general rule [is] that the object of damages is to make the injured party whole, that is, to put

[13] Section 205 provides that a trustee who has committed a breach of trust "is chargeable with (a) any loss or depreciation in value of the trust estate resulting from the breach of trust; or (b) any profit made by him through the breach of trust; or (c) any profit which would have accrued to the trust estate if there had been no breach of trust." 1 Restatement (Second) of Trusts 458.

[14] For example, Illustration 5 provides: "A is trustee of $10,000 in cash. He deposits the money in a bank which he knows or has reason to know is insolvent. The bank fails and A recovers only $4000 from the bank. A is liable for the loss." 1 Restatement (Second) of Trusts 459.

him in the same condition in which he would have been if the wrong had not been committed and the trustee had done his duty. Both direct and consequential damages may be awarded." George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 701, at 198 (2d ed. rev. 1982) [hereinafter Bogert & Bogert] (footnote omitted) (liability for breach of investment duties); see *Russell,* 473 U.S. at 157 (Brennan, J., concurring); see also *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 418-419 (1975) (application of similar principles of equity to Title VII).

As the materials discussed above demonstrate, respondent errs in suggesting (Br. in Opp. 8-9) that the make-whole relief requested by petitioners constitutes a "damage[s]" remedy not cognizable in equity.[15] "Trusts are, and have been since they were first enforced, within the peculiar province of courts of equity." 3 Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* § 197, at 188 (4th ed. 1988) [hereinafter Scott & Fratcher].[16] Thus, although a beneficiary's action to

[15] Respondent's analysis resembles the analysis of the Eleventh Circuit in *Useden* v. *Acker,* 947 F.2d 1563, 1580 (1991), petition for cert. pending, No. 91-1944 (filed June 1, 1992).

[16] See *Lessee of Smith* v. *McCann,* 65 U.S. (24 How.) 398, 407 (1861) (equity has "exclusive jurisdiction of trusts and trust estates"); 2 Joseph Story, *Commentaries on Equity Jurisprudence* § 1302, at 648 (W.H. Lyon, Jr. 14th ed. 1918) ("For the most part indeed matters of trust and confidence are exclusively cognizable in Courts of Equity; there being few cases except bailments, and rights founded in contract * * * in which a remedy can be administered in the Courts of Law."); 3 William Blackstone, *Commentaries on the Laws of England* *431 ("*fraud, accident,* and *trust* are the proper and peculiar objects of a court of equity"); Sir Edward Coke, *The First Part of the Institutes of the Laws of England* § 464, at 272b* (beneficiary of trust "had no remedie by the common law, but for breach of trust, his remedie was only by *subpoena* in chancerie").

recover losses resulting from a breach of duty superficially resembles an action at law for damages, such relief traditionally has been obtained in courts of equity.[17] Hence, because that relief is, by definition, "equitable relief," there is no reason it should not be available in an action under Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3). See *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 486 (1990) (noting that "there is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek 'pension benefits,' " and explaining that "[i]t is clear that the relief requested" in that case—which included a prayer for compensatory damages—"is well within the power of federal courts to provide" under ERISA).

b. It also is clear that equitable remedies for a breach of trust included monetary awards against nonfiduciaries who knowingly participated in a breach of trust. Again, the Second Restatement of Trusts is explicit. Section 326 provides that "[a] third person who * * * has notice that the trustee is committing a breach of trust and participates therein is liable to the beneficiary for any loss caused by the breach of trust." 2 Restatement (Second) of Trusts 124

[17] See, *e.g.*, 4 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 1080, at 229 n.15 (Spencer W. Symons 5th ed. 1941) [hereinafter Pomeroy] (explaining that the equitable liability for breach of trust is "of the same nature as that arising from breach of contract"); 3 William Blackstone, *Commentaries on the Laws of England* *439 ("The form of a trust * * * gives the courts of equity an exclusive jurisdiction as to the subject-matter of all settlements and devises in that form, * * * but the trust is governed by very nearly the same rules, as would govern the estate in a court of law, if no trustee was interposed."); see also F.W. Maitland, *Equity* 110-111 (2d ed. 1936) (explaining that the historical reason trusts were not enforced at law apparently was that "the Chancellors were beforehand in this matter and, by giving a far more perfect remedy than the common law courts could give, made any remedy in those courts unnecessary").

(1959).[18] This Court also has recognized that principle. *Seminole Nation* v. *United States*, 316 U.S. 286, 296 (1942) ("It is a well established principle of equity that a third party who pays money to a fiduciary for the benefit of the beneficiary, with the knowledge that the fiduciary intends to misappropriate the money or otherwise be false to his trust, is a participant in the breach of trust and liable therefor to the beneficiary.").[19] Thus, if a trustee's agent knowingly participates and assists in a breach of fiduciary duty, the agent could be held liable for losses arising from the breach. See, *e.g.*, 4 Scott & Fratcher, *supra*, § 326.4, at 310-313; 2 Restatement (Second) of Trusts, *supra*, § 326 comment a, at 124. Allegations such as those made by petitioners—that an actuary knowingly participated in a breach of fiduciary duty while acting as the fiduciary's

[18] Treatises and commentators uniformly have supported this view as well. Bogert & Bogert, *supra*, § 901, at 257 ("[T]he beneficiary, as equitable owner of the trust res has the right that third persons shall not knowingly join with the trustee in a breach of trust."); 4 Scott & Fratcher, *supra*, § 326.5, at 314 ("Where the third person knowingly and actively participates in the breach of trust, there is no difficulty in holding him liable."); Austin Wakeman Scott, *Participation in a Breach of Trust*, 34 Harv. L. Rev. 454, 481 (1921) [hereinafter Scott] ("If third persons knowingly participate with a fiduciary in a breach of his obligations it is proper to hold them liable."); 4 Pomeroy, *supra*, § 1080, at 230 ("If third persons are parties to a breach of trust, they are equally liable with the trustee.").

[19] State court decisions also have recognized this principle. See, *e.g.*, *First National Bank of Kingman* v. *Byrnes*, 59 P. 1056, 1058 (Kan. 1900) ("As a general principle, all persons who knowingly participate or aid in committing a breach of trust are responsible for the wrong, and may be compelled to make good the loss."); *Wechsler* v. *Bowman*, 34 N.E.2d 322, 326 (N.Y. 1941) ("The principle of law which the plaintiff urges has been reiterated by this court many times. Any one who knowingly participates with a fiduciary in a breach of trust is liable for the full amount of the damage caused thereby to the cestuis que trust.").

agent – accordingly would be sufficient to state a cause of action in equity under traditional principles of trust law.[20]

2. The relief sought by petitioners is appropriate because it ensures that ERISA affords beneficiaries no less protection than they would have had in courts of equity before ERISA

As this Court has explained, "ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans.' " *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983)); see 29 U.S.C. 1001(b) ("[T]he policy of [ERISA is] to protect * * * the interests of participants in employee benefit plans and their beneficiaries.").[21] Thus, the Court has been reluctant to interpret ERISA in a way that "would afford less protec-

[20] There is no doubt that the cause of action lies in equity. See, *e.g.*, *Seminole Nation*, 316 U.S. at 296; Scott, *supra*, 34 Harv. L. Rev. at 454 ("Anyone who participates with a trustee in a breach of trust may be held liable in a court of equity. * * * [I]f he has never received or no longer holds the trust property or its proceeds, he may be held liable in equity for damages."); Bogert & Bogert, *supra*, § 901, at 257 (rights of beneficiary rest on status "as equitable owner of the trust res"); *Cahall v. Lofland*, 114 A. 224, 237 (Del. Ch. 1921) ("One who participates with a trustee in a breach of trust may be held liable in a court of equity."), *aff'd*, 118 A. 1 (Del. 1922); *Whitford v. Reddeman*, 219 N.W. 361, 365-366 (Wis. 1928) ("[T]he power to compel an accounting by a trustee, and to hold those liable with him for mismanagement of the trust are well-recognized and well-defined powers of a court of equity.").

[21] The legislative history underscores this purpose. See 120 Cong. Rec. 29,932 (1974) (remarks of Sen. Williams) (the objectives of ERISA's fiduciary-related provisions "are to make applicable the law of trusts; * * * to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust").

tion to employees and their beneficiaries than they enjoyed before ERISA was enacted," *Firestone*, 489 U.S. at 114, and has never interpreted ERISA to circumscribe the equitable remedies available at common law. Adopting the rule established by the court of appeals, however, would do just that.

With exceptions not relevant here, Section 514(a) of ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any [covered] employee benefit plan." 29 U.S.C. 1144(a). Hence, ERISA preempts any cause of action dependent on proof that the defendant participated in a breach of a fiduciary duty to an ERISA plan, because any such cause of action would "relate to" the plan by considering the duties imposed on fiduciaries of the plan. See *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 483 (1990) (cause of action for wrongful termination to avoid paying benefits is preempted); *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 47-48 (1987) (common-law causes of action based on improper processing of a claim for benefits "undoubtedly meet the criteria for pre-emption"). Hence, ERISA leaves the States powerless to provide beneficiaries with a state-law remedy against nonfiduciaries. Any right of recovery dependent on proof that the defendant participated in a breach of a fiduciary duty to an ERISA plan would be preempted.[22]

[22] If ERISA did not preempt state-law causes of action in the area, matters would be just as unsatisfactory, because the "liability of non-fiduciaries would be assessed by varying state laws, while the conduct and liability of the fiduciary whom the third party is claimed to have knowingly assisted in breaching a duty would be governed by federal law." *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 281 (2d Cir. 1992). Such a result would interfere significantly with Congress's patent intent to bring uniformity to the administration of employee benefit plans. See *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9-10 (1987).

Fiduciaries will not always have the financial capability to provide complete relief. See, *e.g.*, *Brock* v. *Gerace*, 635 F. Supp. 563, 569 (D.N.J. 1986). The absence of a remedy against nonfiduciaries therefore will prevent beneficiaries in some cases from being made whole. In our view, and in the view expressed by common-law courts for centuries, it is inequitable to require innocent beneficiaries to sustain such a loss, instead of the individuals who knowingly participated in the fiduciary's wrongful conduct. Because ERISA defines the scope of available relief through principles of equity, that traditional view of what is equitable in these circumstances should preclude dismissal of petitioners' claims.

In sum, the traditional existence of a right of equitable recovery for individuals in the position of petitioners, coupled with ERISA's broad preemption clause, provides powerful support for the conclusion that the remedy sought by petitioners is "appropriate equitable relief" to "redress" the alleged violations of ERISA and the plan.

C. *The Availability of a Civil Penalty Against Nonfiduciaries Under Section 502(l) of ERISA Demonstrates the Propriety of Awarding Such Relief Under Section 502(a)(3)*

1. Section 502(*l*) of ERISA, 29 U.S.C. 1132(*l*) (Supp. II 1990) confirms that Section 502(a)(3) should be interpreted to authorize monetary relief against nonfiduciaries. Section 502(*l*)(1) provides in relevant part:

> In the case of –
>
> (A) any breach of fiduciary responsibility under * * * part 4 of this subtitle by a fiduciary, or
>
> (B) any knowing participation in such a breach * * * by any other person,
>
> the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

Section 502(*l*)(2)(B), in turn, defines the term "applicable recovery amount" to include "any amount * * * ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section." 29 U.S.C. 1132(*l*)(2)(B) (Supp. II 1990).

Because Section 502(*l*)(2)(B) by its terms applies only to actions instituted under Sections 502(a)(2) and 502(a)(5), the reference to sums recovered from a fiduciary "or other person" necessarily indicates that it is possible to recover sums from "other person[s]" under at least one of those two subsections. Because Section 502(a)(2) authorizes only "relief under [Section 409]," and because Section 409 authorizes relief only against "[a]ny person who is a fiduciary," Section 502(a)(5) is the only provision under which the Secretary plausibly could recover sums from any "other person." The authority granted to the Secretary by Section 502(a)(5), however, is substantively identical to the authority granted to beneficiaries under Section 502(a)(3) to "obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter."[21] Hence, the only logical alternatives to our reading of Section 502(a)(3) are (a) to conclude that the reference to an "other person" in Section 502(*l*)(2)(B) was erroneous, or (b) to hold that the substantively identical passages in Sections 502(a)(3) and 502(a)(5) have different meanings. Neither course comports with ordinary principles of statutory construction. See, *e.g.*, *Moskal* v. *United States*, 111 S. Ct. 461, 466 (1990) ("[A] court

[21] The only difference between the provisions is that Section 502(a)(3) contains plural references to "violations" and "provisions" of ERISA, where Section 502(a)(5) contains singular references to a "violation" and a "provision" of ERISA.

should give effect, if possible, to every clause and word of a statute." (internal quotation marks omitted)); *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992) (noting "the basic canon of statutory construction that identical terms within an Act bear the same meaning"); *Patterson* v. *Shumate*, 112 S. Ct. 2242, 2251 (1992) (Scalia, J., concurring) ("[C]onsistency of usage within the same statute is to be presumed."). Therefore, Section 502(*l*) indicates that Section 502(a)(3)'s grant of power to afford "appropriate equitable relief" includes the power to afford the time-honored equitable remedy granting make-whole monetary relief against nonfiduciaries who knowingly participate in breaches of fiduciary duty.[24]

2. Notwithstanding the import of Section 502(*l*) explained above, the court of appeals concluded that the statute that enacted Section 502(*l*) – the Omnibus Budget Reconciliation Act of 1989 (OBRA), Pub. L. No. 101-239, § 2101, 103 Stat. 2123 – actually supports the position of respondent. The court noted that when Congress enacted OBRA, it considered and did not enact an amendment to ERISA that explicitly would have authorized claims

[24] Section 4975 of the Internal Revenue Code also indicates that Section 502(a)(3) authorizes actions against nonfiduciaries. That provision, which was enacted contemporaneously with Title I of ERISA, levies a tax on "disqualified person[s]" who engage in prohibited transactions, a class of persons that includes nonfiduciaries. 26 U.S.C. 4975(a) and (b); see *Nieto*, 845 F.2d at 874 n.6. The provision provides that before sending a notice of deficiency to such parties, the Secretary of the Treasury shall notify the Secretary of Labor to give her a reasonable opportunity to obtain a correction of the prohibited transaction. 26 U.S.C. 4975(h). The only way the Secretary of Labor could obtain a correction, however, would be by a civil action pursuant to Section 502(a)(5) against the "disqualified person." Thus, 26 U.S.C. 4975, like Section 502(*l*) of ERISA, rests on the premise that Section 502(a)(5), and thus Section 502(a)(3) as well, allows actions against parties other than fiduciaries.

against persons who knowingly participate in fiduciary breaches. See H.R. 3299, 101st Cong., 1st Sess. § 3151(e)(6)(A) (1989), 135 Cong. Rec. H6006 (daily ed. Sept. 27, 1989). As this Court repeatedly has indicated, however, Congress's failure to act "lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.' " *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *United States* v. *Wise*, 370 U.S. 405, 411 (1962)).

In this case, two of the circumstances surrounding OBRA's enactment support the inference that Congress failed to act because of its view that ERISA already authorized the relief sought by petitioners, not because it wished to deny that relief. First, the House Report accompanying OBRA noted that, at the time of the proposed amendment, "[a]ll but one of the Circuit Courts of Appeal that ha[d] considered the issue ha[d] held that the broad remedial powers conferred on federal courts under ERISA section 502(a)(3) and (5) create an implied cause of action against non-fiduciaries who knowingly participate in breaches of fiduciary duty proscribed by ERISA." H.R. Rep. No. 247, 101st Cong., 1st Sess. 77 (1989). The Ninth Circuit alone had held to the contrary. See *ibid.* It is implausible to infer that congressional inaction reflected acquiescence in what Congress apparently understood to be the minority view of the statute. Second, the amendment was proposed to "clarif[y]" the existence of a right of action against nonfiduciaries. *Ibid.* Starting from that motivation, it would have been reasonable for Congress to remove the amendment when it chose to enact another provision – Section 502(*l*) – that indicated that such relief was available. Accordingly, Congress's failure to overrule *Nieto* expressly does not undermine the strong indication

Section 502(*l*) offers: Section 502(a)(3), like Section 502(a)(5), allows monetary relief against nonfiduciaries who knowingly participate in a breach of trust with respect to an ERISA plan.

D. *This Court's Decision In* **Massachusetts Mutual Life Insurance Co. *v.* Russell** *Does Not Foreclose the Claim for Relief in This Case*

1. Interpreting ERISA to incorporate the trust-law principles of nonfiduciary liability also is consistent with *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985), on which the Ninth Circuit relied to support its contrary conclusion in *Nieto*, 845 F.2d at 872. In *Russell*, a beneficiary sued a plan fiduciary for bad-faith processing of her claim for benefits, asserting a right to recover compensatory and punitive damages that were not available under the terms of the plan. But the remedy in Section 502(a)(1)(B) for a beneficiary who is denied benefits wrongfully allows the beneficiary only "to recover benefits due to him *under the terms of his plan*." 29 U.S.C. 1132(a)(1)(B) (emphasis added). Accordingly, because the beneficiary was seeking relief in excess of the relief available under Section 502(a)(1)(B), the beneficiary relied on Section 502(a)(2), 29 U.S.C. 1132(a)(2), which permits a beneficiary to sue a fiduciary for a breach of fiduciary duty under Section 409. See *Russell*, 473 U.S. at 139-140.

The Court declined to read Section 409 as enlarging the beneficiary's "explicitly authoriz[ed]" (473 U.S. at 144) right to recovery for wrongful denial of benefits. Relying heavily on the overall purpose of Section 409(a) – which provides that a fiduciary "with respect to [an ERISA] plan" is personally liable to "make good to such plan any losses to the plan" that result from a breach of the fiduciary's duties – the Court concluded that the general reference to "other equitable or remedial relief" that appears in Section 409(a) authorizes only " 'plan-related' relief," which could not encompass a right to recover damages on a beneficiary's own account. 473 U.S. at 142.

2. For several reasons, *Russell* is not controlling here. First, and most obviously, the beneficiary in *Russell* sued exclusively under Sections 409 and 502(a)(2), and placed no reliance on Section 502(a)(3), the provision at issue in this case. *Russell*, 473 U.S. at 139 n.5 (respondent "expressly disclaim[ed] reliance on § 502(a)(3), [so] we have no occasion to consider whether any other provision of ERISA authorizes recovery of extracontractual damages"); see *id.* at 149 (Brennan, J., concurring).

Second, the question at issue in this case is quite different from the question at issue in *Russell*. As noted above, *Russell* involved a claim for relief brought by a beneficiary against a fiduciary, based on a particular violation, with respect to which the provisions of Sections 409 and 502(a) provided for a specified recovery that was less than the recovery sought by the beneficiary; moreover, it was not suggested that the relief was traditionally available under the law of trusts. By contrast, the beneficiary here is attempting to obtain "equitable relief" as authorized by the statute; the only question is whether the statutory term includes make-whole monetary relief against nonfiduciaries. In answering that question, we believe that it is entirely consistent with *Russell* to interpret ERISA (as the Court did in *Firestone*) to carry forward traditional principles of trust law.

Finally, a broad reading of *Russell* barring the relief sought in this case would render Section 502(a)(3)(B) essentially useless, because Section 409 and the other provisions of Section 502(a) already authorize removal of the trustee, as well as declaratory and injunctive relief to

prevent future violations. If "other appropriate equitable relief * * * to redress * * * violations" does not include other types of relief courts of equity would have issued to redress violations of fiduciary duties, then it has no substantial purpose. See *Russell*, 473 U.S. at 155 (Brennan, J., concurring); compare, *e.g.*, *Moskal* v. *United States*, 111 S. Ct. 461, 466 (1990) ("[A] court should give effect, if possible, to every clause and word of a statute." (internal quotation marks omitted)).

3. Although portions of the Court's opinion in *Russell* reflect reluctance to recognize new remedies that Congress "simply forgot to incorporate" in ERISA, 473 U.S. at 146 – on the theory that implying new remedies would render the existing remedies set forth in Sections 409 and 502(a)(1)(B) superfluous – that concern is not implicated here. Section 409 not only provides general authority to award appropriate relief against a fiduciary who breaches his duties under ERISA, but also provides that a fiduciary shall be subject to certain very definite remedies for breaching the duties imposed under ERISA: make-whole relief for the plan, disgorgement of profits earned in breach of trust, and removal of a fiduciary. 29 U.S.C. 1109(a). Even if Section 502(a)(3) authorizes courts to derive the same remedies by incorporating equitable trust principles into ERISA, the enumeration of certain remedies in Section 409 would not be superfluous, because it would ensure that the specified relief would be available irrespective of the federal courts' conclusions regarding the content of the equitable principles incorporated into Section 502(a)(3). In effect, therefore, Section 409, as implemented by Section 502(a)(2), places a floor under the types of relief available from a fiduciary.

In sum, Section 502(a)(2) and the other precise remedial provisions Congress included in Section 502(a) form the first part of the "comprehensive civil enforcement scheme"

set forth in Section 502(a), *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 485 (1990); they establish the basic minimum remedies. Sections 502(a)(3) and 502(a)(5) complete the scheme, by broadly authorizing courts to develop other remedies as appropriate in light of the equitable principles underlying ERISA, as modified in light of ERISA's particular terms. Because those principles allow beneficiaries to seek make-whole relief from nonfiduciaries, Section 502(a)(3) should do the same.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

ERISA § 409(a), 29 U.S.C. 1109(a), provides:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

ERISA § 502(a), 29 U.S.C. 1132(a), provides:

Persons empowered to bring a civil action

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

ERISA § 502(*l*), 29 U.S.C. 1132(*l*) (Supp. II 1990) provides:

Civil penalties on violations by fiduciaries

(1) In the case of –

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1) –

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that –

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of title 26.

ERISA § 514(a), 29 U.S.C. 1144(a), provides:

Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

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